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IN THE MATTER OF THE APPLICATION OF
WEST END WATER COMPANY FOR AN
EXTENSION OF ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY.

DOCKET NO. W-01157A-05-0706

STAFF'S RESPONSE BRIEF

I. INTRODUCTION

Staff has reviewed the closing briefs in the above-captioned matter by West End Water Company ("West End") and City of Surprise ("City") on November 1, 2006. Staff continues to rely on the arguments set forth in its November 1, 2006 Closing Brief. However, Staff feels it is necessary to respond to certain issues raised by the City's Opening Post Hearing Brief.

II. WEST END'S APPLICATION WAS SATISFACTORY WHEN FILED

The Application was sufficient at the time filed and it did not change simply because there is a prospective new owner. As even the City recognizes, the major significance of the request for service is that it indicates an existing need for water service.¹ Change in ownership does not change the existence of that need as a close examination of the testimony the City cites reveals. According to the testimony of the prospective new owner at the hearing, clearly there is a need for service. Gene Morrison, the Regional President of Woodside Homes, did not have a preference for a specific water provider. Although Mr. Morrison testified the developer is neutral on the issue of whether the City or West End should be the water provider for the extension area,² he was unequivocal that he is "comfortable with any scenario that provides water to the project."³

...

¹ See City's Closing Brief at 11 stating that requests for service demonstrate need for water service. See also Sept. Tr. at 173:6-13. (Testimony of Ms. Chukwu to the effect that the relevance of requests for service is that there is a need for service regardless whether it is a prior or later, prospective landowner).

² Sept. Tr. at 87:13-16

³ Sept. Tr. at 87:24-25; see also Transcript of Sept. 7, 2006 Hearing Before the Maricopa County Planning and Zoning Commission ("MCDP Tr.") at 15:5-10 (Woodside representative Mike Curley explained "as long as we get water, we're happy")

1 There is thus no need to confirm with a merely cumulative demand for additional requests for
 2 service what has already been established by the testimony at hearing. The City's demand for
 3 additional time to determine a developer preference⁴ is contrary to the express testimony of the
 4 developer, the public interest and the requirements for a sufficient Certificate of Convenience and
 5 Necessity ("CC&N") extension application. There was an initial request for service when the
 6 application was made and found sufficient. There is a change in the prospective owner.⁵ The
 7 prospective owner has testified under oath that there remains a need for water. No evidence that the
 8 City can reference reasonably undermines the logic behind Staff's determination that the operative
 9 function of requests for service – establishing a need for water service⁶ – has already been satisfied,
 10 and continues to exist despite future changes in ownership.

11 The City may argue that it is necessary to recognize that the ultimate property owner has an
 12 interest in the water provider and for that reason proposes delay to identify the preferences of the
 13 final owner.⁷ This suggests a paradoxical situation that provides no compelling reason to further
 14 delay the CC&N proceedings. The immediately foreseeable property owner is the developer, whose
 15 greatest interest in obtaining water service is to sell homes. The quality of service issues that the City
 16 argues favor it are not as relevant to the developer as they would be to homeowners.⁸ However, there
 17 can be no homes constructed or sold without water service. Thus, the City's contention that the
 18 public interest demands confirmation from the ultimate property owner as to which service provider
 19 to choose creates the risk of placing the cart before the horse.

20 The City may argue that, based on representations made during the Maricopa County
 21 Planning and Zoning Commission meeting, Woodside Homes has expressed a preference for having
 22 the City provide water service. *See* MCDP Tr. at 15:18-16:3 (Mr. Curley of Woodside Homes
 23 opining that the Commission typically accords strong weight to property owners' desires.) Mere
 24

⁴ *See* City's Closing Brief at 12 requesting the Commission postpone any decision until the developer expresses a preference about the water provider.

⁵ At the time of hearing, Walden Farms remained the actual owner. May Tr. at 286:22-24

⁶ According to Staff witness Ms. Chukwu, "The issue here is that there is a need... It does not matter whether it's from the current person or whether it's from the old position... basically all it's saying is that there is going to be a need of water in that territory." Sept. Tr. at 173:6-13.

⁷ *See eg.* City's Closing Brief at 12 requesting postponement of a decision until the future owner indicates a preference.

⁸ *See eg.* City's Closing Brief at 2 discussing affordability, service quality, standards, and protection benefits over private service.

1 conjecture made before the county planning board cannot be as indicative of the prospective
 2 landowner's desires as statements made later during sworn testimony at the Commission's
 3 evidentiary hearing on the matter. However, it is not necessary to determine whether statements
 4 made at the September hearing supersede statements made at the prior county board meeting because
 5 the statements were consistent in both circumstances. The developer has clearly articulated the
 6 absence of any preference for either provider so long as there will be water service.⁹

7 Further, as Staff Witness Ms. Chukwu testified, additional delay merely serves to prejudice
 8 West End. (May Tr. at 298:5-6). Against this consideration, the City's demand that the Commission
 9 postpone reaching a decision on granting the CC&N extension should be denied as it serves no useful
 10 purpose. There is no need to confirm a developer preference when the developer has expressed that
 11 he has no preference. (Sept. Tr. at 87). The important information that the initial request for service
 12 relayed, that there was and continues to be a need for service remains regardless of the status of
 13 ownership. *See* Sept. Tr. at 87:18-25.

14 **III. THE PUBLIC INTEREST FAVORS GRANTING THE CC&N EXTENSION TO** 15 **WEST END**

16 The City's challenges to the public interest recommendation of Staff are uniformly
 17 unpersuasive. It cannot supply water to the area now. It can supply water to the disputed area in the
 18 same timeframe as West End. However, such facility would be physically isolated from the rest of
 19 the Surprise system. *See* May Tr. at 144:11-146:11, 263:22-264:7. Thus, any benefit connected to
 20 the capacity of existing facilities lies in favor of West End which can simply expand existing plant to
 21 serve the extension area¹⁰ rather than construct a small, stand-alone system that will be essentially
 22 temporary in nature. (May Tr. at 144:11-146:11, 263:22-264:7).

23 Also, West End's supposed financial weakness that the City points to does not argue against
 24 granting the CC&N extension to West End. If the developer is putting in place the infrastructure
 25 either way, the limited resources at West End's disposal the City makes reference to¹¹ amount to a
 26

27 ⁹ Sept. Tr. at 87:13-16, 87:24-25; MCDP Tr. at 15:5-10.

28 ¹⁰ *See* May Tr. at 143:4-16 indicating West End's plans to interconnect the Walden Ranch booster station with the
 Wittman and Wheat systems.

¹¹ City's Closing Brief at 9.

1 negligible disadvantage if at all. *See* May Tr. at 147:8-148:16 discussing use of developer
2 contributions to construct the system until revenues are sufficient to refund the contributions. Thus
3 the financial risk is on the developer rather than West End, and so West End's financial strength is not
4 truly relevant.

5 However, the City would actually be injurious to the developer in this regard because it will
6 likewise require the developer fund the installation of infrastructure yet will not refund those
7 advances when there is a revenue stream. (May Tr. at 149:6-8, 322:7-23).

8 Further, the City's reliance on Decision No. 68453 ("Woodruff") is misplaced.¹² Woodruff
9 involved a large, established water service provider that disputed the CC&N application of a
10 relatively smaller developer owned start-up water company. Contrary to the City's implications, to
11 align the parties of that case as though they were the parties of this case, the City would be the large
12 water company, which would be Arizona Water Company ("AWC") in Woodruff that ultimately lost
13 the decision and West End would be in the position of the smaller start-up lacking the history, support
14 structure or experience of AWC. The sole similarity between the City and the startup utility in
15 Woodruff is that both offer integrated water and wastewater service.

16 However, the fact that Woodruff offered integrated service was not the sole determinative
17 factor for that case, as close examination of the record in that case ably demonstrates. Rather, it was
18 Staff's experience with small wastewater utilities' financial instability that prompted its
19 recommendation. *See* Docket No. W-04264A-04-0438 Tr. at 1375 (Staff witness Steve Olea testified
20 that the single most important of several factors favoring the developer owned startup utility was that
21 integration would improve the long term viability of both the water and wastewater utilities).
22 Essentially, Staff reasoned in Woodruff that by pairing the vulnerable wastewater utility with a water
23 utility, that would have an easier time collecting its bills, it would improve the viability of both
24 entities. *See* Docket No. W-04264A-04-0438 Tr. at 1340-1341, 1372-1374 (Staff has experience with
25 collapsing sewer utilities); Decision No. 68453 at 12:26-13:2 (Stand alone sewer utilities have greater
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28 ¹² *See* City's Closing Brief at 25 referring to Decision No. 68453 where the Commission granted a CC&N to a developer owned startup utility that offered integrated service rather than to the larger, established water service provider.

1 financial problems). Consequently, improved viability and not the simple fact of integration of the
2 utilities was the basis for the recommendation to the Commission.

3 In fact, AWC argued that integration was a non-issue in Woodruff because wastewater service
4 could be supplied regardless of who supplied water and thus any benefit to the public would exist
5 regardless of integration. To support its argument, it suggested the nearby City of Coolidge
6 ("Coolidge") could provide wastewater service for the area. However, it turned out that Coolidge
7 would not serve the area. See Decision No. 68453 at 11:4-9. Ultimately, regardless of who served
8 water, the vulnerable, private wastewater company created by the developer would of necessity serve
9 the area.¹³ Rather than risk a utility face a catastrophic demise, Staff recommended and the
10 Commission approved awarding the CC&N to the start-up water company.

11 The benefits of integration are not at issue here. The City will provide wastewater service for
12 the area regardless who ultimately provides the water service and thus all the benefits of efficient
13 wastewater reuse and conservation of scarce resources will be met regardless of integration between
14 water and wastewater providers. Further, as a municipality, the City does not have the viability
15 concerns that a solitary private wastewater utility would have, as was decisive of the Woodruff
16 Decision. If anything, the City's arguments regarding the viability of West End¹⁴ argue that if the
17 Decision in Woodruff applies to this case, the Commission should find in favor of West End as a
18 CC&N extension may similarly improve its viability.¹⁵ The addition of the approximately 1,500 new
19 customers the developer will add¹⁶ will doubtless improve the financial stability of West End which
20 presently serves approximately 215 customers.¹⁷ Thus, at best for the City, the reference to the
21 Woodruff Decision simply does not support their position and at worst actually argues in favor of
22 granting the CC&N to West End.

23 ...

24 ...

25 _____
26 ¹³ Also, testimony adduced at trial indicated that allowing the private sewer company to stand alone would exacerbate its financial vulnerability. Decision No. 68453 at 12:56-13:2.

27 ¹⁴ See City's Closing Brief at 7-9 generally disputing West End's abilities on the basis of its size and resources.

28 ¹⁵ As the City points out, "West End is a 'small water system serving a rural population...'" City's Closing Brief at 7 citing Exhibit A-4,p.5; May Tr. at 160:24-261:2..

¹⁶ See May Tr. at 41:9-15.

¹⁷ May Tr. at 161:18-25.

1 **IV. GRANTING THE CC&N EXTENSION TO WEST END CHALLENGES NO**
2 **MUNICIPAL AUTHORITY**

3 Another similarity to Woodruff that the City does not mention that is also applicable to this
4 case is that, as with the City here, AWC was distantly removed from the disputed territory. The
5 relevance of that fact was that it extinguished any question that AWC, as the stronger, established
6 water provider was entitled to any priority as of right. In Woodruff, AWC could claim to be within a
7 mile of the contested area on three of four sides.¹⁸ Here, the City cannot even claim that its border is
8 within one mile of the area presently in dispute. See May Tr. at 289:8-13 (Staff witness Ms. Chukwu
9 testifying that the City's boundary is approximately one and a half miles away from the West End
extension area.)

10 This represents a defect to the City's argument that it is entitled to serve the disputed area.
11 Foremost is the problem that the area is not within the City's corporate boundary. For example, the
12 City makes much of the fact that A.R.S. § 40-282 requires that the certificate applicant first obtain the
13 necessary consent from the governing local authority. "Consequently, if the requested extension area
14 in this matter were within Surprise's corporate limits, the Commission would be legally prohibited
15 from granting West End's application without the consent of the City of Surprise." City Closing
16 Brief at 15. The important consideration is that the disputed area is *not* within the City's corporate
17 area, nor is it even contiguous with it. (May Tr. at 289:9-13) Were it at least contiguous, it still
18 would not necessarily be persuasive of the issue whether the public interest favors denying a CC&N
19 to a private water supplier in the face of a municipality's objections. See Decision No. 68607
20 (Commission found that public interest favored private water company ready to serve the area over
21 municipality with ambiguous plans to eventually serve the same area.)

22 The case law cited by the City's brief with regard to special deference does not alter that
23 analysis either. For example, the City cites *Uni-Bell PVC Pipe Ass'n v. City of Phoenix*, WL 3211540
24 (D. Ariz. Nov. 28, 2005), dealing with a motion for summary judgment over the City of Phoenix's
25 ban on the use of PVC pipe for sewer construction. Nowhere in the decision does it broach the topic
26 of whether that deference extends outside the borders of the City proper or even suggest it. Neither
27 do any of the other authorities the City relies on for this proposition. See *Sulfur Springs Valley Elec.*

28 ¹⁸ See Docket No. W-04264A-04-0438 Staff Report at 2.

1 *Coop., Inc. v. City of Tombstone*, 99 Ariz. 110, 407 P.2d 76 (1965) (dealing with municipality's ability
2 to sell assets of its own municipal corporation); *City of Glendale v. White*, 67 Ariz. 231, 194 P.2d 435
3 (1948) (upholding city council's determination of what was an appropriate use of public funds by the
4 city); *Edwards v. State Bd. of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450 (1950) (recognizing that
5 there must be a correlation between the law enacted under the police power and a policing purpose).
6 In none of these cases is there the slightest indication that a municipality receives any deference
7 *beyond* the area of its own competence, literally the area within its own city limits.

8 In an extension of the argument that the City deserves deference, the City argues that it has a
9 constitutional priority to serve as of right in recognition of this supposed deference.¹⁹ This contention
10 deserves no weight. The authorities cited by the City do no more than establish that the City *may*
11 enter activities also engaged in by private enterprise. Staff does not propose to interfere with the
12 City's constitutional "right to furnish water ... to customers without, as well as within, its corporate
13 limits"²⁰ and thereby compete with or displace private enterprise. However, the City points to no
14 authority standing for the proposition that it has extraordinary authority when venturing outside its
15 own borders for which it would be owed deference.

16 Staff's recommendation only expresses an educated opinion that the public interest favors
17 granting a qualified monopoly to the closest and nearest water service provider who can most quickly
18 provide the requested service. If the City proposes to furnish water to the same location, it certainly
19 appears that the law says that it may and Staff does not suggest that the Commission has the authority
20 to undermine constitutionally granted authority to do so on an equal footing with any other entity.
21 The fact that the City would be providing water at the economic detriment of the certificate holder,
22 and thereby possibly incur taking without just compensation liability may prove a strong disincentive
23 for the City to ignore the existence of a lawfully granted CC&N. See City's Closing Brief at 11
24 referring to *Sende Vista Water Co. v. City of Phoenix*, 127 Ariz. 42, 617 P.2d 1158 (Ariz App. 1980)
25 (Finding that municipality may not serve water within CC&N area certificated to private water utility
26 without justly compensating for property loss).

27
28 ¹⁹ See City's Closing Brief at 18 demanding that the Commission recognize the City's "special deference" by "avoiding any actions that would interfere with Surprise's constitutional authority to provide water service."

²⁰ City's Closing Brief at 14 citing *City of Phoenix v. Kasun*, 54 Ariz. 470, 474, 97 P.2d 210, 212 (1939).

1 That disincentive, however, does not rise to the level that the City suggests is the case here:
2 that granting a CC & N undermines a municipality's authority to furnish municipal services. As the
3 court in *Sende Water* clearly articulated, the municipality continues to possess the condemnation
4 authority regardless of the existence of the CC & N. *Id* at 46, 617 P.2d at 1162. Rather, as *Sende*
5 *Water* illustrates, it is the certificate holder's protected interest in the certificate that, in that case, gave
6 rise to the utility's right to injunctive relief against the municipality's provision of water service
7 unless it was justly compensated. *Id* at 45, 617 P.2d at 1161.

8 Similarly, the City appears to be of the incorrect belief that Commission Staff approached the
9 CC&N application as though it were judging between competing applications. Staff clarifies that it
10 does not disagree with the City's assertion that the City has no legal obligation to "submit a
11 competing application to serve to the Commission because the Commission has no authority to judge
12 the City's competence or authority to serve." City's Closing Brief at 16 n. 7. However, this assertion
13 misses a crucial point - the Commission does have the authority to gauge the merits of a public
14 service corporation²¹ and effectively the City has come before the Commission, not for a
15 determination that it is more worthy to serve but that West End is unworthy.²² To that end, the City
16 offers an ill-formed proposition: that the Commission determine, based on the evidence supplied by
17 West End, that even though it is thoroughly adequate as a water provider on its own merits, or can be
18 shortly,²³ West End should still be denied the CC&N because the City objects. City's Closing Brief at
19 13-18.

20 The City offers no basis for comparison that might quantify or establish superior service
21 capabilities or economies that might benefit the ratepayer which could be persuasive as to why not to
22 grant the CC&N extension. Rather it focuses its argument solely on the notion that since it is
23 permitted to serve anywhere it pleases, granting the CC&N to West End would interfere in the
24 limitless potential service area open to the City.

25 ...

26
27 ²¹ Arizona State Constitution Article 15 Section 2 & 3.

28 ²² See City's Closing Brief at 10-13 alleging reasons why West End's application should be denied.

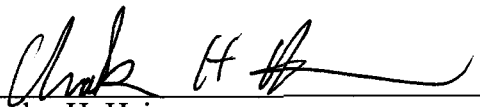
²³ West End has experienced significant water loss issues that have every indication will be remedied in due course. See Tr. at 152-153.

This argument is not compelling. If the City desires a finding that the public interest disfavors granting the CC&N to West End, it must offer evidence competent to demonstrate that fact. This is not a challenge to the City's authority not to be subject to making a competing application because the Commission is not asking the City to demonstrate it is better suited to serving the area. Rather, the City has placed the issue at stake and should thereby bear the corresponding burdens of establishing its professed superiority. As the territory remains unincorporated into the City, there is no competing authority issue involved in granting the CC&N extension to West End. The City is not presently offering any service to the territory and consequently has not established any authority over the extension area to undermine.

V. CONCLUSION

For the above stated reasons and those expressed in Staff's Closing Brief, Staff's recommendation that West End's application for CC&N extension should be granted.

RESPECTFULLY SUBMITTED this 21st day of November, 2006.


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